United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

To be argued by
DAVID A. LEFF

74-1951

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1951

AMERICAN TELEPHONE & TELEGRAPH CO.,
Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW AND TO SET ASIDE AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR AMERICAN TELEPHONE & TELEGRAPH CO.

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Preliminary Statement

The Decision and Order of the National Labor Relations Board which is the subject of this appeal was rendered by a three-member panel of the Board (Chairman Miller and Members Fanning and Penello) and is reported at 211 NLRB No. 115 (June 20, 1974).

Statement of the Issue

Whether, upon the factual findings made by the Administrative Law Judge and accepted by the Board, and the applicable case law, the Company violated Section 8(a)(1)

of the National Labor Relations Act, 29 U.S.C.A. §158 (a)(1) when it issued a warning notice to an employee and Union representative for her abusive conduct toward a supervisor.

Statement of the Case

Nature of the Case

On this appeal, American Telephone & Telegraph Co. (the "Company") petitions for review and to set aside, and the National Labor Relations Board seeks enforcement of a Decision and Order of the Board, directing the Company to expunge a warning notice from the personnel file of Anne H. Walden ("Walden"), an employee of the Company who is also a representative of Local 1150, Communications Workers of America (the "Union", having the title of Union Chairperson).

Walden had requested of a supervisor, with whom she did not regularly transact Union business, some information she believed necessary to her function as a Union representative. This request was made at a regular Union-Company grievance meeting. The supervisor did not have the information available then but sent it to her through a Union steward before the end of the day.

Under the collective bargaining agreement between the parties, and consistent with the needs of the business, the Company is required, *upon reasonable notice,* to afford employees who are also Union representatives *time off without pay* to conduct Union activities. In addition, another section of the collective bargaining agreement requires that all meetings between Company and Union representatives be conducted with mutual responsibility and respect. Notwithstanding these provisions, three days later, Walden

appeared unannounced and uninvited—and without any previous notice—in the supervisor's work area, and, in the presence of at least ten employees shouted at the supervisor, criticized the information submitted and made comments about his lack of intelligence. Later that day, he issued a notice warning that if Walden engaged in similar behavior again, she would subject herself to severe discipline.

The principal issue to be determined is whether Walden's disrespectful behavior and insulting remarks—made not in the context of a closed-door meeting but in the work area and in the presence of a number of employees—was protected, so that the Company could not even warn against its repetition.

The Proceedings Before the NLRB

Following the issuance of a complaint by the Regional Director of Region 2 of the National Labor Relations Board ("Board" or "NLRB"), a hearing was held in New York City on December 13, 1973, before Administrative Law Judge Eugene E. Dixon. On March 26, 1974, Judge Dixon issued his opinion, accepting the Company's version of what had transpired:

> "In my opinion the evidence here considered in the light of the record as a whole preponderates strongly in favor of Respondent's version which accordingly I accept. And even allowing for an element of exaggeration in Beckett's testimony, I further find that Walden's conduct exceeded the limits permitted her when involved in union business." [134a.]*

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* Numerical references followed by "a" refer to pages of the Joint Appendix.

He ordered that the complaint be dismissed. [135a.]

The General Counsel excepted to Judge Dixon's decision [137a] and, on June 20, 1974, the Board rendered a Decision and Order holding the Company's issuing of the warning notice violated Section 8(a)(1) of the Act and directing that the notice be expunged from Walden's record. In the Board's view, while "Walden's conduct here was less than genteel," . . . it "was not so opprobrious as to be unprotected." [144a, 145a-146a.]

The Company's petition for review and to set aside the Board's Decision and Order was filed in this Court on July 15, 1974. The Board's cross-application for enforcement was filed on August 22, 1974.

Statement of Facts

Preliminary Statement

The Company furnishes communication services and facilities throughout the country and overseas, and its Long Lines Department has offices and employees in major cities and all states in the nation. The New York Overseas Division, located at 32 Avenue of the Americas in Manhattan, handles telephone calls to foreign countries and interconnects calls that originate abroad. [28a.] Certain Traffic Department employees who perform this service are members of the Union, which bargains on their behalf and represents them in grievances with the Company. [27a.] Walden is an overseas operator and Traffic Section Chairperson of the Union. [26a.] In the latter capacity, she represents certain telephone operators at the Manhattan facility and at a branch in White Plains, New York. [27a.]

Prior to October 14, 1973, the Traffic Department at 32 Avenue of the Americas was divided into four operating districts (*i.e.*, "A", "B", "C" and "D"), each with an Operations Manager who reported to the Division Manager. [28a.] On or about June 26, 1973, there was a meeting attended by Union and Company representatives, including Walden and the District "A" Manager, Walter H. Nichols. [29a.] The purpose of the meeting was to discuss the closing of Overseas District "A", the absorption of its responsibilities and employees by the remaining three districts and a new Division Seating Plan for the operators. [29a.] The new Division Seating Plan, to be effective October 14, 1973, was necessitated by the phase-out of District "A". [30a.]

Following the June 26 meeting, the Company gave Walden, in her capacity as Union Chairperson, substantial amounts of information relevant to the closing of Overseas District "A" and the new Division Seating Plan. [46a-47a, 87a, 93a.] Walden said that the individual to whom she looked primarily for the necessary information was Walter H. Nichols. [32a, 63a-64a.]

The September 14, 1973 Grievance Meeting

On September 14, a formal meeting, in accordance with the procedures set forth in the collective bargaining agreement, was held between Union and Company representatives at which Walden was the Union's spokesman. Nichols was on vacation and William E. Beckett, Jr. ("Beckett"), a Company supervisor who reported to Nichols, substituted. [92a.] The Union and the Company take notes at these meetings, which are then reduced to formal minutes. [19a-20a, 98a.] Therefore, each side has a written, permanent record of what transpired.

The Company's written minutes of the September 14 meeting reveal that there were two items on the agenda. [99a.] The first concerned a discipline problem involving an overseas operator, Miss Abrahams, and her supervisor, Miss Hiebner. [99a.] The Union objected to the manner in which Miss Hiebner had disciplined the operator. Walden's point was regardless of whether discipline was necessary, each side has an obligation to treat the other with respect. [97a.] Walden had contractual support for this position and cited Section 19.30 of the collective bargaining agreement that the Union and the Company had negotiated:

> "The Company and the Union recognize that it is in the best interests of both parties, the employees and the public, that all dealings between them continue to be characterized by mutual responsibility and respect . . . ." [97a.]

Beckett agreed with Walden's position. [97a.] Then the meeting turned to the subject of part-time hours within the new Seating Plan. Beckett attempted to give Walden some data [97a-98a], but she told him that that was not the information she wanted. [98a.] She asked Beckett how many part-time tours existed in the Division [98a] and he replied that he did not have the information available at the moment but would provide it before the end of the day. [98a.] The meeting ended amicably [98a], and Walden received the information late that afternoon. [18a, 101a.]

The Events of September 17, 1973

On Monday morning, September 17, Walden appeared in Beckett's office while she was on her Company-paid, personal relief time as an overseas operator. [161a.]

However, Section 15.60 of the collective bargaining agreement states:

> "To the extent that service and coverage requirements permit, an employee who is an authorized representative of the Union shall, with reasonable notice and upon request of the Union, be excused without pay or granted leaves of absence without pay to conduct union activities." [61a.]

At the hearing, Walden admitted that her trip to Beckett's office had not been for a formal Union meeting. [70a.] Therefore, Beckett properly could have refused to see her. His office was a cubicle, partially enclosed by a partition that did not extend to the ceiling. [105a, 196a.] The room did not have a door [42a, 111a] or any other means of ensuring privacy from the employees whom Beckett supervised and who were working in the area when Walden arrived. [111a.]

At first, they chatted informally but the conversation changed abruptly. [102a.] Walden shouted, "I'm here to talk about the garbage you sent me." [102a.] When Beckett asked what she meant, she said, even more loudly, "That little piece of paper in that big envelope!" [103a.]

Although Beckett cautioned Walden to change her tone and manner [104a], she continued shouting, "I thought you would be intelligent enough to interpret my request." [103a.] When Beckett responded that he had tried to comply with her request [103a], Walden screamed, "I'm not here to play games." [103a.] Walden continued shouting and making remarks about Beckett's intelligence [104a], and then she left the work area. [104a.] The Administrative Law Judge found that Beckett did not shout or raise his voice to Walden. [134a.]

During the entire episode, which lasted three to five minutes [110a], Walden never stated what information she needed or wanted clarified or why the information provided was not satisfactory. [105a.]

Walden's shouting was heard by all the Company's employees who worked in the area. Sandra Hooper heard Walden's remark about "garbage" [117a] and testified that Walden's shouting caused all the employees to stop their work "because it is not something you hear every day in the office." [117a.]

Two members of the Company's Force Group who were working in an adjacent conference room "contacting" operators for the new Seating Plan testified that they had heard Walden shouting. [119a, 123a.]* The work that they were doing was very exacting, and distractions could have caused mistakes. [120a.] They did not hear Beckett [121a] and did not know that he had been the recipient of Walden's remarks until later. [121a, 125a.]

A few hours after the incident, Beckett met with Walden to inform her that he was issuing her a disciplinary warning for her earlier behavior. [21a.] This meeting took place in Nichols' office, which was totally enclosed, with the door shut. [76a, 107a.] Beckett stated to Walden that the reason for the warning was her personal and abusive attack which, in addition, had departed from any legitimate or relevant request for clarification. [106a.]

He issued the warning to her in her capacity as overseas operator because she was on personal time (although paid by the Company) during the incident [106a], but since

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* On hearing Walden's shouts, one stated, "There she goes again." [124a.]

the purpose of her visit was Union business, he also issued the warning to her in her capacity as Union representative. [106a.]

Summary of Argument

The protection afforded Union representatives by Section 7 of the Act, 29 U.S.C.A. §157, is not absolute and that protection must be balanced against the Company's right to maintain order and respect. Conduct which arguably might be acceptable in the heat of a Union-Company grievance meeting attended by a handful of people and conducted behind closed doors, should not be given the same leeway when it takes place on the work floor and in the presence of a number of employees who are not part of the grievance procedure. Furthermore, conduct that clearly violates the contractual procedures for grievance meetings cannot be ignored in balancing the rights of the parties. The Board ignored all these facts when it rendered its decision.

In addition, the Board gratuitously substituted its business judgment for the Company's and failed to consider those factors necessary for the Company to maintain order and respect. Therefore, the Board did not properly balance the rights of the parties and, consequently, its decision must be set aside.

ARGUMENT

The Board's Conclusion Is Not Supported, But Rather Is Contradicted by Its Own Factual Findings and Legal Precedent, Which Demonstrate That the Proper Balancing of the Rights of the Parties Was Not Made.

In its decision in this case, the Board held:

> "... we have long recognized that the disagreements which arise in the collective-bargaining setting sometimes tend to provoke commentary which may be less than mannerly, and that the use of strong language in the course of protected activities supplies no legal justification for disciplining or threatening to discipline an employee acting in a representative capacity, except in the most flagrant or egregious of cases. While, therefore, Walden's conduct here was less than genteel, we find in view of all the foregoing that her conduct was not so opprobrious as to be unprotected. . . . " 211 NLRB No. 115. [137a, 143a-144a.]

Although the protection afforded Union representatives by the National Labor Relations Act is not absolute but dependent on the factual circumstances, the Board chose to ignore completely the facts surrounding the incident that led to Walden's discipline.

When Walden had her meeting with Beckett on September 17, 1973, it was in derogation of the contractual procedures relating to the conduct of grievance meetings between Company and Union representatives. These rules provide for the orderly conduct of Union-Company business. [63a.]

Despite the fact that Walden's appearance in Beckett's office was not in accordance with contractual procedures, and even though Beckett was not the person with whom Walden usually dealt, the Board held she enjoyed Union representative status in that meeting. However, the Board did not consider—or even mention—either of Walden's violations of the collective bargaining agreement relating to the conduct of grievance meetings. The facts are that, in violation of the collective bargaining agreement, and without giving Beckett a chance to say whether he would see her [62a], Walden sought him out on the eighth floor, where he worked. Beckett did not have a private office, and any loud conversation that took place in his cubicle could be—and in this case was—overheard by the people he supervised, who worked in the area.

Walden's loud and abusive behavior which even the Board termed "less than genteel" [144a], distracted the employees who worked in the area and who heard their supervisor abused and his intelligence insulted. However, the Board held that this conduct "was not so opprobrious as to be unprotected" [144a], despite the fact that it was in violation of the collective bargaining agreement, not part of a formal grievance meeting, and occurred on the work floor in the presence of several employees supervised by Beckett.

> "As other cases have made clear, flagrant conduct of an employee, even though occurring in the course of Section 7 activity, may justify disciplinary action by the employer. On the other hand, not every impropriety committed during such activity places the employee beyond the protective shield of the act. The employee's right to engage in concerted activity must

> permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect." *NLRB* v. *Thor Power Tool Co.*, 351 F. 2d 584, 587 (7th Cir. 1965).

The Board, by ignoring all the crucial facts in this case, did not balance respective rights in a manner that considered the Company's right to maintain order and respect.

The Board Decision, which we urge should be set aside, relied on two cases: *Houston Shell and Concrete Co.*, 193 NLRB 1123 (1971) and *Crown Central Petroleum Corp.*, 177 NLRB 322 (1969), *enf'd*, 430 F. 2d 724 (5th Cir. 1971). [144a, n.2.]

Houston Shell, supra, is distinguishable in all respects. The Section 8(a)(1) violations in that case concerned interrogations, surveillance, discharges and threats to employees during a union organizing campaign. The facts, as found by the Trial Examiner, bear no relation to those in the instant case. Part of that case, however, concerned an employee who was discharged for improper language toward a supervisor. The Trial Examiner found there that the supervisor provoked the employee by initiating the obscenities. 193 NLRB at 1129-1130. Here, the Administrative Law Judge found that Beckett was innocent of any provocation. [134a.]

In *Crown Central Petroleum Corp., supra,* the Board held, and the Fifth Circuit agreed, that two employees were disciplined for conduct that did not exceed the Act's protection. The employees, one a union representative, received letters reprimanding them for abusive and insubordinate language directed at supervisors and warning that any

repetition would be treated more severely. The union representative, in addition, received a one-day suspension for failing to restrain the employee. The employee used the abusive and insubordinate language during a regular, formal and closed grievance meeting, in which he called the supervisor a liar. The grievance involved the supervisor's earlier position regarding the employee's duty to work overtime.

The Board, in its opinion in *Crown Central, supra,* specifically pointed out that the comment which the employer found objectionable was made at a scheduled and closed grievance meeting. Moreover, the grievance procedures were set forth in the collective bargaining agreement between the union and the employer, and the parties had set up this meeting in accordance with those procedures. *Within this factual framework* the Board said:

> "The issue is not whether the statements by Harris and Gilliam were justified by either the Trial Examiner's standards or ours, but rather whether these statements were so opprobrious as to remove them from the otherwise protected nature of the grievance meeting." At 322.

In enforcing the Board's decision and order in *Crown Central,* the Court of Appeals for the Fifth Circuit defined the situation in which the conduct of the two employees remained protected:

> "*Of central importance to our view of the case,* is the nature of the protected activity involved . . . . Manly [the supervisor] *was not assailed with abuse on the floor of the plant where he stood as a symbol of the Company's authority;* the characterization of the un-

truth came while he was appearing as a Company advocate *during a closed meeting with Union representatives.*" 430 F. 2d 724, 731. (Emphasis added.)

In reviewing whether the Board made the proper balance, the Fifth Circuit held that of *central importance* were the setting and circumstances in which the alleged impropriety took place. Since in the present case Beckett was, in fact, "assailed with abuse on the floor of the plant where he stood as a symbol of the Company's authority" and the abuse did not come during a contractually approved grievance meeting, the Board's reliance on *Crown Central* is misplaced. The limitations implicit in the court's decision in that case support the Company's position that issuance of the warning notice was appropriate to maintain order and respect.

Finally, in its decision the Board minimized the effect of Walden's behavior on the Company's operation:

> ". . . contrary to Respondent's claim, there is no evidence that Walden's conduct caused any substantial disturbance of its operations. At most her loud talk distracted 10 persons for a couple of minutes and, as one of them testified, she stopped work momentarily because she wanted to overhear what was being said." 211 NLRB No. 155. [143a, n.1.]

However, the balancing process is not satisfied merely by a determination of the *amount* of *economic* disturbance to the Company. The balancing process, as the Board and courts have stated, is to weigh the employee's (Union representative's) right to engage in protected activity against the Company's right to maintain order and respect. *NLRB* v. *Thor Power Tool Co.*, 351 F. 2d 584, *supra.*

Because the Board cannot evaluate the degree of financial or operational loss that can result from employees being distracted or supervisors being abused on the work floor and losing face (or, for that matter, Walden being compensated as an overseas operator when she was acting as a Union representative), it has no jurisdiction to assert its business judgment over that of the Company. More important, it cannot use its business judgment as a yardstick for what is "egregious" or "opprobrious" conduct. *See, e.g., NLRB* v. *Blue Bell, Inc.*, 219 F. 2d 796, 798 (5th Cir. 1955).

In *NLRB* v. *Prescott Industrial Products Co.*, 500 F. 2d 6 (8th Cir. 1974), the court found that the Board erred in holding that Section 8(a)(1) of the Act had been violated by the discharge of an employee for his conduct at the employer's pre-election campaign speech:

> "The Board apparently is enunciating a general principle that insolvent, rough and intimidating conduct cannot serve as a basis for discharge if the conduct is carried out in connection with the assertion of protected activity under Sec. 7 of the Act and that unless such improper conduct, including threats, intimidations and acts adverse to the operation of the employer's business is 'egregious', the same must be accepted as a normal and usual incident of labor-management relationships. *But a line must be drawn* lest there be a complete disintegration of the relationships reasonably required, under any circumstances, between management and labor, to the detriment of both. The Act, as we have noted, does not purport to give the Board any control whatever over the employer's policies concerning tenure of employment, *and his measures of disci-*

pline and standards of conduct within his plant remain his own." * *Id.* at 11. (Emphasis added.)

Based on the foregoing, if the appropriate balancing was not made in this case—if the Company had the right to maintain order and respect under the facts here presented —the petition for review must be granted and the Board's Decision and Order must be denied enforcement.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the petition for review be granted and that the Board's Decision and Order of June 20, 1974, be set aside in all respects.

Respectfully submitted,

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* This is especially true here, since the Company and the Union collectively bargained the procedures under which grievance meetings would be held and the condition that all dealings and discussions between their representatives would be characterized by mutual responsibility and respect. Walden, the Union representative, violated both provisions.

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 74-1951

AMERICAN TELEPHONE & TELEGRAPH CO.,

Petitioner ~~Plaintiff~~

against

NATIONAL LABOR RELATIONS BOARD

Respondent ~~Defendant~~

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF New York *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
3 Laurel Drive Mineola, New York, New York 11501

That on November 15, 1974 *deponent served the annexed*
BRIEF FOR AMERICAN TELEPHONE & TELEGRAPH CO.

on Elliot Moore and John M. Flynn
attorney(s) for National Labor Relations Board
in this action at National Labor Relations Board Washington, D.C. 20570
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in ~~a post office~~ official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this 15th
day of November, 1974

Russell M. Banks

RUSSELL M. BANKS

Philip Castellano Jr

The name signed must be printed beneath

PHILIP CASTELLANO JR.